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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5862

PETER HOCHSTEIN,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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Citations to Opinion Below..... 1

Jurisdiction..... 2

Questions Presented for Review..... 2

Constitutional Provisions Involved..... 5

Statutes Involved..... 5

Statement of the Case..... 6

Reasons for Granting the Writ..... 9

Conclusion..... 18

Appendix "A" - Supreme Court of the State of Nebraska Opinion..... 19

Appendix "B" - Supreme Court of the State of Nebraska Order Denying Petition for Rehearing..... 20

Appendix "C" - Constitutional Provisions Involved..... 21

Appendix "D" - 18 U.S.C., Section 2515..... 22

Appendix "E" - Statutes 29-2519 to 29-2522 and 86-112 R.R.S. (1943)..... 23

Appendix "F" - Memorandum and Order..... 24

C I T A T I O N S

Adams v. Washington, 403 U.S. 947 (1971)..... 13

Bell v. Ohio, 438 U.S. 637 (1978)..... 15

Brown v. Illinois, 422 U.S. 590 (1975)..... 10

California v. Green, 399 U.S. 149 (1970)..... 15

Commonwealth v. Cephas, 291 A.2d 106 (1972)..... 10

Davis v. Georgia, 429 U.S. 122 (1976)..... 13

Furman v. Georgia, 208 U.S. 238 (1972)..... 16

Greg v. Georgia, 428 U.S. 153, 206 (1976)..... 16

Harbor v. Page, 390 U.S. 719 (1968)..... 15

Harris v. Texas, 403 U.S. 947 (1971)..... 13

Jurek v. Texas, 428 U.S. 262, 269 (1976)..... 16

Locket v. Ohio, 438 U.S. 586 (1978)..... 15

Proffit v. Florida, 428 U.S. 242, 253 (1976)..... 16

State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1978) 15

State v. Hochstein, 207 Neb. 51, ___ N.W.2d ___ (1980).. 10

State v. Holtan, 205 Neb. 314, 287 N.W.2d 671 (1980)..... 15
State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979).. 16,17
U.S. v. Ceccolini, 435 U.S. 268 (1978)..... 10
Wigglesworth v. Ohio, 403 U.S. 947 (1971)..... 13
Witherspoon v. Illinois, 391 U.S. 510 (1968)..... 8,13

UNITED STATES CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V..... 21
United States Constitution, Amendment VI..... 21
United States Constitution, Amendment VIII..... 21
United States Constitution, Amendment XIV..... 21

STATUTES INVOLVED

18 U.S.C., Section 2515..... 22
Neb. R.R.S. (1943) 29-2519..... 23
Neb. R.R.S. (1943) 29-2520..... 23
Neb. R.R.S. (1943) 29-2521..... 23
Neb. R.R.S. (1943) 29-2521.01..... 23
Neb. R.R.S. (1943) 29-2521.02..... 23
Neb. R.R.S. (1943) 29-2521.03..... 23
Neb. R.R.S. (1943) 29-2521.04..... 23
Neb. R.R.S. (1943) 29-2522..... 23
Neb. R.R.S. (1943) 29-2523..... 23
Neb. R.R.S. (1943) 86-112..... 23

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

TO: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

Peter Hochstein, petitioner, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Nebraska, entered in the above-entitled case, on the 15th day of August, 1980, and the denial of a rehearing in the above-entitled case entered on the 7th day of October, 1980.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of the State of Nebraska is found in Appendix "A" hereto, infra, page 19, and

is reported at 207 Neb. 51, ___ N.W.2d ___. The order of the Supreme Court of Nebraska denying petitioner's Petition for Rehearing is found in Appendix "B" hereto, infra, page 20. The order of the trial court concerning petitioner's motion to suppress is found in Appendix "F" hereto, infra, page 24.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER EVIDENCE OBTAINED AS A RESULT OF AN ILLEGAL WIRETAP MAY NOT BE USED IN ANY TRIAL OF PERSONS WHOSE CONVERSATIONS WERE INTERCEPTED, NOR EVIDENCE DERIVED FROM SUCH ILLEGAL WIRETAP.

II

WHETHER EVIDENCE DERIVED FROM INFORMATION GAINED FROM AN ILLEGAL WIRETAP IS TAINTED BY SUCH ILLEGALITY AND AS SUCH IS INADMISSIBLE.

III

WHETHER THE BURDEN OF PROOF IS UPON THE STATE, AFTER A SHOWING BY THE DEFENDANT OF AN ILLEGAL WIRETAP, TO PROVE THAT THE OFFERED EVIDENCE WAS OBTAINED THROUGH INDEPENDENT SOURCES.

IV

WHETHER, WHEN THE IDENTITY OF A WITNESS IS GAINED FROM AN ILLEGAL WIRETAP, AND WHEN SUCH WIRETAP LEADS THE STATE TO INTENSIFY INVESTIGATION OF SUCH PERSON, THE WITNESS'S TESTIMONY IS TAINTED BY SUCH ILLEGALITY.

V

WHETHER THE TESTIMONY OF A LIVE WITNESS MAY BE EXCLUDED WHEN SUCH TESTIMONY IS THE PRODUCT OF AN ILLEGAL WIRETAP, AND NO INDEPENDENT SOURCE EXISTS FOR SUCH TESTIMONY.

VI

WHETHER, WHEN FACTS AND CIRCUMSTANCES GLEANED FROM AN ILLEGAL WIRETAP AND KNOWLEDGE GARNERED THEREFROM ARE USED TO COERCE A WITNESS'S TESTIMONY, SUCH TESTIMONY IS NOT FROM AN INDEPENDENT SOURCE AND AS SUCH IS INADMISSIBLE.

VII

WHETHER THE CONSTITUTIONALLY IMPERMISSIBLE EXCLUSION OF ONE MEMBER OF THE JURY PANEL DURING VOIR DIRE FOR EXPRESSING CONSCIENTIOUS SCRUPLES CONCERNING THE DEATH PENALTY WITHOUT A SHOWING ON THE RECORD THAT THE TRIAL COURT CAREFULLY EXAMINED THE JUROR TO DETERMINE THAT SHE WAS IRREVOCABLY COMMITTED AGAINST THE DEATH PENALTY AS TO UNEQUIVOCALLY EFFECT HER DECISION ON GUILTY, REQUIRES THE SETTING ASIDE OF THE SUBSEQUENT IMPOSITION OF THE DEATH PENALTY.

VIII

WHETHER THE EVOLVING STANDARDS OF DECENCY WHICH MARK THE PROGRESS OF OUR SOCIETY REQUIRE THE SETTING ASIDE OF THE DEATH SENTENCE AS CRUEL AND UNUSUAL PUNISHMENT.

IX

WHETHER THE NEBRASKA CAPITAL SENTENCING PROCEDURES VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO CONFRONTATION AND EQUAL PROTECTION IN THAT ONLY IN A CAPITAL CASE IS THE ACCUSED DENIED THE RIGHT TO HAVE THE SENTENCER EVALUATE THE DEMEANOR OF THE WITNESSES AGAINST HIM.

X

WHETHER THE NEBRASKA CAPITAL SENTENCING PROCEDURE IS CONSTITUTIONALLY DEFICIENT BECAUSE IT STATUTORILY LIMITS THE MITIGATING FACTORS WHICH MAY BE CONSIDERED BY THE SENTENCER.

XI

WHETHER THE NEBRASKA STATUTORY PROCEDURES GOVERNING THE IMPOSITION OF DEATH BY THE DISTRICT COURT VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE, 1) THEY ARE VAGUE AND INDEFINITE; AND 2) THEY EXCLUDE ANY JURY IMPUT; AND 3) THEY LACK STANDARDS TO INSURE FAIRNESS, UNIFORMITY AND REVIEWABILITY; AND 4) THEY LIMIT THE MITIGATING FACTORS WHICH MAY BE CONSIDERED; AND 5) THEY CONTAIN NO LEGISLATIVE STANDARDS FOR DETERMINING WHEN TO INVOKE A THREE JUDGE PANEL; AND 6) ONCE A PANEL HAS BEEN SELECTED, THEY CONTAIN NO LEGISLATIVE GUIDANCE TO DETERMINE WHAT VOTE IS NECESSARY TO IMPOSE THE DEATH PENALTY.

XII

WHETHER THE NEBRASKA STATUTORY PROCEDURES FOR THE APPELLATE REVIEW OF THE DEATH PENALTY VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BECAUSE THEY DO NOT PROVIDE THE NECESSARY CHECK AGAINST THE RANDOM AND ARBITRARY IMPOSITION OF THE DEATH SENTENCE AND FURTHER BECAUSE THEY CONTAIN NO ASCERTAINABLE STANDARDS AND BECAUSE THE STANDARDS WHICH ARE SET DOWN ARE ONLY OF COSMETIC VALUE BECAUSE THE LEGISLATURE HAS PROVIDED NO AID AND/OR STAFF OR GUIDELINES FOR COMPILING THE RELEVANT INFORMATION.

XIII

WHETHER THE NEBRASKA SUPREME COURT'S LIMITING OF ITS REVIEW OF DEATH SENTENCES TO ONLY THOSE CASES WHERE A CONVICTION FOR FIRST DEGREE MURDER WAS ENTERED, IN CLEAR AND DIRECT CONTRADICTION TO THE LAW, VIOLATES THE PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented involve Amendments V, VI, VIII and XIV of the United States Constitution which are set forth in Appendix "C" hereto, infra, page 21 .

STATUTES INVOLVED

The questions presented involved 18 U.S.C., Section 2515 which is set forth in Appendix "D" hereto, infra, page 22 . The questions also involve Nebraska law, Sections 29-2519, 29-2520, 29-2521, 29-2521.01, 29-2521.02 29-2521.03, 29-2521.04, 29-2522,29-2523 and 86-112, R.R.S (1943) which are all set forth in their entirety in Appendix "E" hereto, infra, page 23 .

STATEMENT OF THE CASE

On June 16, 1977, almost twenty (20) months after Ron Abboud was found dead, Peter Hochstein was charged with the crime of murder in the first degree. During pre-trial discovery, petitioner learned that he had been the subject of an illegal wiretap conducted by a private investigator and that information gained from the wiretap had been furnished to the State.

On November 3, 1977, the petitioner moved to suppress all evidence gained as a result of the illegal wiretap and all evidence derived therefrom, because of its inadmissibility under both Federal and State law. Hearings were held on November 23 and November 28, 1977. As a result of those hearings, the District Court held that the petitioner had shown that the illegal wiretapping had "tainted" the State's case. Additional hearings were held on November 28, November 30 and December 1, 1977, to allow the State the opportunity to remove the "taint" by showing an independent source for the challenged evidence. On December 23, 1977, the District Court, entered an order suppressing all the challenged evidence because it was gathered as a result of an illegal wiretap. (See Memorandum and Order of trial judge, Appendix " F ", infra, page 24).

The State of Nebraska took an interlocutory appeal to a single judge of the Nebraska Supreme Court. The decision, filed March 22, 1978, affirmed in part and reversed in part the rulings of the District Court. In essence, the court suppressed all of the evidence gathered as a result of the illegal wiretap, with the exception of the testimony of Lon Reams. It was, and remains, the contention of the petitioner that the knowledge of Lon Reams as a witness was derived solely from the illegal wiretap and that there was no independent source. (See complete statement of facts concerning the discovery of Lon Reams as a witness in trial judge's

Memorandum and Order, Appendix "F", infra, page 24).

On May 1, 1978, the jury trial was commenced in the District Court of Douglas County, Nebraska. During voir dire, a member of the jury panel was excluded for expressing conscientious scruples concerning the imposition of the death penalty. No careful examination of the juror to determine the extent of her bias was reported. The petitioner's Motion for Mistrial based upon this improper exclusion was denied.

The case proceeded to trial. All motions to dismiss, suppress and for mistrial made prior to and during the trial were renewed at the conclusion of the State's case and overruled. On May 13, 1978, the jury returned a verdict of guilty. All issues were again raised by the petitioner in his Motion for New Trial which was overruled on August 22, 1978.

At the discretionary request of the trial judge, two additional District judges were assigned by the Supreme Court of the State of Nebraska for the purpose of determining sentence. Sentencing hearings were held on June 23 and July 14, 1978. On August 24, 1978, the panel sentenced Peter Hochstein to die in the electric chair. Pursuant to Nebraska law an automatic stay of execution was entered pending appeal to the Nebraska Supreme Court.

In his appeal the petitioner raised all matters which had previously been ruled upon by the District Court, among which included the following Federal questions:

1. The use of evidence derived as a result of an illegal wiretap in violation of both State and Federal statutes.

2. The improper exclusion of a juror during voir dire.

3. The unconstitutionality of the Nebraska statutory scheme for the imposition and appellate review of the death sentence.

During preparation of his appeal, petitioner filed a Motion to Stay all proceedings pending the review and analysis

"of all criminal homicides" required by Nebraska law, Section 29-2521.02 R.R.S. (1943).

Petitioner's research conclusively demonstrated that the information required by law for a meaningful review had not been gathered. The failure of the Legislature to provide guidance, staff or funding to aid the court made the goals of the law unattainable. The court denied the request for a stay and the motion of the petitioner to take the deposition of the Clerk of the Supreme Court, which deposition would have confirmed the failure of the court to gather the necessary information.

The court affirmed petitioner's conviction on August 15, 1980, and denied petitioner's timely request for a rehearing on October 7, 1980.

The petitioner seeks this Writ of Certiorari to the Supreme Court of the State of Nebraska for the following reasons, to wit:

1. The evidence against him was derived from an illegal wiretap in violation of 18 U.S.C. Section 2515.

2. The jury which tried this case was "death qualified" by the prosecution in violation of his Federal constitutional rights as set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968), and its progeny.

3. The statutory scheme for imposition of the death penalty in Nebraska violates the constitutional prohibition against cruel and unusual punishment; it further denies the defendant equal protection and confrontation rights; it statutorily limits the mitigating factors which may be considered by the sentencing body; it lacks legislative standards to insure fairness, uniformity and reviewability; it does not contain a proper appellate review to guard against the random and arbitrary imposition of the death sentence; and it denies the petitioner effective assistance of counsel.

REASONS FOR GRANTING THE WRIT

I

EVIDENCE OBTAINED AS A RESULT OF AN ILLEGAL WIRETAP, INCLUDING THE IDENTITY OF A WITNESS, MAY NOT BE USED IN ANY TRIAL OF PERSONS WHOSE CONVERSATIONS WERE INTERCEPTED, NOR EVIDENCE DERIVED FROM SUCH ILLEGAL WIRETAP.

Petitioner respectfully submits that in his case the identity of Lon Reams as a potential witness-defendant (emphasis supplied) was not known to the police or local law enforcement officials until the contents of an illegal wiretap conducted by a private investigator was brought to the attention of such law enforcement officials. The petitioner submits that the contents of these tapes, or at the very least, the information gleaned from listening to these tapes, was then used to coerce the witness Reams to testify against petitioner.

Petitioner submits that the use of conversations so intercepted is a violation of both State and Federal law. Section 86-712 of the Nebraska statutes provides that:

> When ever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in any trial....

Further, United States Code, Section 2515, provides that:

> When ever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, ...

The State has never contended that the conduct of the private investigator, Whelan, was legal and therefore if the identity of Reams as a potential witness was derived from the contents of the tapes, his testimony is inadmissible and should have been suppressed.

The courts have consistently held that the testimony of a live witness may be excluded where such testimony is the product of an illegal wiretap, and no independent source exists for such testimony. Brown v. Illinois, 422 U.S. 590 (1975); Commonwealth v. Cephas, 291 A.2d 106 (1972); U.S. v. Ceccolini, 435 U.S. 268 (1978). In Ceccolini, the court held:

> An examination of these cases leads us to reject the Government's suggestion that we adopt what would in practice amount to a per se rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment. We also reaffirm the holding of Wong Sun, supra, that 'verbal evidence which derives so immediately from unlawful entry and an unauthorized arrest as the officers actions in the present case is no less the "fruit" of official illegality than the more common place tangible fruits of the unwarranted intrusion.'

The Supreme Court of the State of Nebraska, in addressing issues raised by the petitioner, made certain fact findings clearly not supported by the record. In its opinion, the court pointed out, that:

> The record clearly establishes that the witness Reams was not unknown to either Whelan or the State prior to the illegal wiretaps. When Whelan was first hired by the Abboud family, he was specifically advised that Reams may be a suspect or at least a party with information. State v. Hochstein, supra, Appendix "A", page 32.

Petitioner submits that these fact findings were erroneous. The identity of Reams as Reams was known to the police and to Whelan prior to the illegal wiretaps. His identity as an individual with any information concerning the police investigation was not known to either Whelan or the police prior to the wiretaps. It is submitted to the court that therein lies the violation.

There can be no disagreement that the testimony of Lon Reams was the crucial and determining evidence against the petitioner. Lon Reams, in his testimony, implicated himself, Peter

Hochstein, and Michael Anderson in the planning and death of Ron Abboud. Lon Reams testified under a complete grant of immunity. The facts surrounding the discovery of Lon Reams by the State must therefore be carefully examined to determine whether this evidence was discovered from any source other than the illegal wiretap. The facts are as follows:

1. The investigation of this case fell upon the jurisdiction of the Douglas County, Nebraska, Sheriff's office.

2. That on June 2, 1976, a private investigator was hired by the Abboud family, under an agreement providing for an hourly rate and a Twenty-Five Thousand Dollars ($25,000.00) bounty if successful.

3. That the records of the Douglas County Sheriff's office show that on June 25, 1976, three weeks after the hiring of the private investigator, the official investigation had turned up no information concerning a possible link between Ron Abboud and Lon Reams, this despite the fact that they had a list of forty (40) potential suspects.

4. From June 2, 1976, until November 11, 1976, the private investigator conducted an investigation which provided no link between Lon Reams and the Abboud homicide.

5. On November 11, 1976, and for the next five and a half (5-1/2) months the private investigator began a course of illegal conduct including breaking and entering and illegal wiretaps.

6. On April 15, 1977, the private investigator, armed with the information gathered as a result of the illegal wiretaps, discussed his theories of the case and played tape recordings for the Douglas County Attorney's office.

7. Between April 15, 1977, and May 31, 1977, the private investigator and the Douglas County Attorney's office met many times, with the private investigator delivering an 87 page report containing

his knowledge and theories of the case, which report, in the investigator's own testimony, was "tainted from the wiretapings, yes".

8. On June 7, 1977, Lon Reams was interviewed for the first time by the authorities as a suspect or potential witness in the case and he totally denied any knowledge or involvement.

9. That the private investigator, at the insistence of the County Attorney's office, the State's prosecutor, placed further pressure upon the witness Reams by using certain information gleaned as a result of the illegal wiretaps.

10. The State, with knowledge gained as a result of the illegal wiretaps, then granted Lon Reams immunity from prosecution and it was then that Lon Reams "agreed" to testify as their star witness.

The petitioner respectfully submits that it is clear from the evidence and from all of the facts that the identity of Lon Reams as a witness in the case against the petitioner was not known and could not have reasonably been discovered by any means other than the illegal wiretap conducted by the investigator Whelan. That even though the wiretap was done without the knowledge of the State, both the Federal and State statutes provide that no evidence derived from such illegal wiretaps be used in evidence. It further is respectfully submitted by the petitioner that it was the very use of this illegal information which was used to coerce the witness into testifying thereby negating any voluntariness on his part insofar as his decision to testify.

II

WHERE THE STATE HAS EXCLUDED A MEMBER OF THE JURY PANEL DURING VOIR DIRE FOR EXPRESSING CONSCIENTIOUS SCRUPLES CONCERNING THE DEATH PENALTY AND THE TRIAL COURT DID NOT CAREFULLY EXAMINE THE JUROR TO DETERMINE WHETHER SHE WAS IRREVOCABLY COMMITTED AGAINST THE PENALTY TO THE EXTENT THAT SHE COULD NOT CONSIDER ALL OF THE EVIDENCE, THE SUBSEQUENT IMPOSITION OF THE DEATH PENALTY MUST BE SET ASIDE.

The record of this case clearly demonstrates that a member of the jury panel was excluded during voir dire for expressing conscientious scruples concerning the imposition of the death penalty. The record does not show that the trial court conducted a careful examination in accordance with the mandates of Witherspoon v. Illinois, supra, and Davis v. Georgia, 429 U.S. 122 (1976).

The subsequent imposition of the death penalty must be set aside. Adams v. Washington, 403 U.S. 947 (1971); Harris v. Texas, 403 U.S. 947 (1971); Wigglesworth v. Ohio, 403 U.S. 947 (1971).

III

WHERE THE STATE STATUTORY SCHEME GOVERNING THE IMPOSITION OF THE DEATH PENALTY VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT, DENIES THE DEFENDANT EQUAL PROTECTION AND CONFRONTATION RIGHTS, LIMITS THE MITIGATING FACTORS WHICH MAY BE CONSIDERED BY THE SENTENCING BODY, DENIES THE ACCUSED THE RIGHT TO JUDGMENT BY HIS PEERS, CONTAINS NO ASCERTAINABLE LEGISLATIVE STANDARDS TO INSURE FAIRNESS, UNIFORMITY AND MEANINGFUL REVIEW, AND DOES NOT PROVIDE A PROPER APPELLATE REVIEW TO PROTECT AGAINST THE RANDOM AND ARBITRARY IMPOSITION OF THE DEATH SENTENCE, IT MUST BE STRUCK DOWN AS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Prohibition against cruel and unusual punishment.

For over twenty (20) years no person has been executed in Nebraska. In 1979 the Nebraska Legislature voted to abolish the death penalty. Only a veto by the Governor has left the death penalty in tact. The Governor's sole reason, as stated in his veto message, was his belief that the death penalty is a deterent to crime. The questions of whether the death penalty is a deterent has been studied exclusively with the results pointing to one unequivocable fact - the death penalty is not a deterent. This court should strike down the Nebraska statutory scheme for imposition of death as a violation of the contemporary community sense of human dignity and therefore cruel and unusual punishment.

B. Denial of equal protection and confrontation rights.

In Nebraska, only a defendant faced with the death sentence may be sentenced by a panel of judges, two of whom have not had the opportunity to evaluate the demeanor of the witnesses against him. This court has consistently held that the right to confrontation guaranteed by the Constitution includes the right to have the trier of fact evaluate the demeanor of the witnesses.

Harbor v. Page, 390 U.S. 719 (1968); California v. Green, 399 U.S. 149 (1970). In all other types of criminal cases, the sentencer has the benefits of confrontation. The Nebraska procedure violates the Sixth and Fourteenth Amendments to the United States Constitution.

C. Limitation of mitigating factors.

The Nebraska law, 29-2523 R.R.S. (1943), limits the mitigating factors which may be considered by the sentencer in violation of the court's decision in Locket v. Ohio, 438 U.S. 586 (1978), and Bell v. Ohio, 438 U.S. 637 (1978). The Nebraska Supreme Court has attempted to save the statute by giving it a liberal interpretation. See State v. Holtan, 205 Neb. 314, 287 N.W.2d 671 (1980). This is the same approach taken by the Ohio Supreme Court in State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1978) and subsequently rejected by this court. The sentencer may not be statutorily precluded from considering "any relevant factors of the character and record of the individual offender." The Nebraska statutes precludes consideration of relevant factors and a liberal construction by the State court cannot cure the defect.

D. Failure to contain legislative standards to insure fairness uniformity and meaningful review.

A defendant in Nebraska facing a possible death sentence may be sentenced either by the trial judge or by a panel of three judges. The procedure used is entirely discretionary, 29-2520 R.R.S. (1943), and is unguided by any legislative standards and, therefore, not subject to meaningful appellate review. Further, once a three judge panel is invoked, there is no legislative guidance to determine what vote of the panel is necessary to impose death. Is a unanimous vote required or majority vote? Can the trial judge, if unhappy with the opinions of the two appointed judges, dispand the panel and impose sentence himself? This has happened under the current procedure and there is no way to determine why, or for this court to review the decision. The Nebraska sentencing scheme is "pregnant with discrimination" and

contains "no meaningful basis for distinguishing the few cases," in which death is imposed from those in which it is not. Furman v. Georgia, 208 U.S. 238 (1972).

E. Failure to provide proper appellate review.

This court has viewed proper appellate review of the death sentence as a constitutionally required safeguard against aberrant lower court decision. See Greg v. Georgia, 428 U.S. 153, 206 (1976); Proffit v. Florida, 428 U.S. 242, 253 (1976); Jurek v. Texas, 428 U.S. 262, 269 (1976).

Nebraska Code Sections 29-2521.01 to 2521.04, 29-2522, 29-2524, 29-2524.01, and 29-2524.02 R.R.S. (1943) represent Nebraska's response to the court's concern for proper appellate review. While at first glance these provisions appear to satisfy the court's concern, a further analysis shows the procedure to be of only cosmetic value because it is impossible for the Nebraska court to carry out the goals of the law. In Greg, supra, at 204, this court specifically noted that the Georgia Legislature had made provisions for a staff to enable the court to compile the data relevant to its consideration. No aid or staff was provided by the Nebraska Legislature and consequently the information required by the law was not gathered. Petitioner's attempt to depose the Clerk of the Supreme Court to show that the information had not been assembled was rejected by the Nebraska Supreme Court. Even the Attorney General of Nebraska conceded in his brief that the information was "not totally complete."

Subsequent to petitioner's appeal, but prior to the opinion, the Nebraska Supreme Court rendered a decision which emasculated the provisions for appellate review of the death sentence. State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979). Section 29-2521.02 R.R.S. (1943) of the Nebraska Code required the Supreme Court to:

> Review and analyze all cases involving criminal homicides committed on or after April 20, 1973. Such

> review and analysis shall examine (1) facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which the defendant was convicted, and (4) the sentence imposed.

Despite the clear requirements of the law and the legislative history surrounding its adoption, the court limited its review to only those cases where a conviction for first degree murder was entered. The purpose of the law was to force the court to examine "all criminal homicides" including those where the jury or the judge entered a conviction for something less than first degree murder or the prosecutor allowed a plea to a reduced charge as a result of a plea bargain. The court, in recognition of the fact that it did not have the relevant information before it, stated that a literal interpretation of the law would create "insurmountable constitutional problems" and gutted the meaning and purpose of the law. The ruling leaves Nebraska without the constitutionally required review of death sentences.

It should be further pointed out that even under the limited interpretation given the law in Williams, the court is still unable to accomplish the review and analysis invisioned by the law, because the information required has never been gathered. The failure of the Legislature to provide guidance, and staff, has made the goals of the law unattainable even under the emasculating interpretation of Williams

CONCLUSION

Petitioner respectfully requests that for the reasons herein set forth, a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Nebraska.

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AUG 13 1980

NOS. 42301, 42302 - filed August 15,1980.

1. Wiretapping: Witnesses: Evidence. If it appears from the evidence that the identity of the witness was obtained from a legal source, the fact that the identity of the witness was also improperly acquired by illegal wiretapping does not render the witness' testimony inadmissible.

2. ____: ____: ____. The use of an intercepted telephone message to induce witnesses to testify in a criminal prosecution, even though it may constitute a violation of a statute forbidding the use of intercepted communications, does not render such testimony inadmissible against a person not a party to the message where no use is made at the trial either of the message itself or of any information contained therein.

3. Trials: Joinder: Appeal and Error. The ruling of a trial court upon a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion.

4. Trials: Joinder: Burden of Proof. It is the duty of one challenging a joint trial to demonstrate how and in what manner he is prejudiced.

5. Juries. One who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the laws of the state must be excused for cause.

6. Polygraph Tests: Prejudicial Error. The mere mention of the word "polygraph" absent more, does not constitute prejudicial error.

APPENDIX "A"

7. Prosecutor Misconduct: Appeal and Error. A party may not raise alleged misconduct of adverse counsel on appeal where, despite knowledge of the alleged misconduct, the party claiming the misconduct failed to request a mistrial and instead agreed to take the chances of a favorable verdict.

8. Venue: Juries: Appeal and Error. A motion for change of venue or to sequester the jury is directed to the sound discretion of the trial court and in the absence of an abuse of discretion, its ruling will not be disturbed on appeal.

9. Criminal Defendants: Prejudicial Error. An accused has the right to be present at all stages of the trial when his absence might frustrate the fairness of the proceedings.

10. Motions to Suppress: Appeal and Error. The procedure for appealing from an order entered, under either the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1979) or Neb. Rev. Stat. § 86-705(12) (Reissue 1976), shall be in accordance with § 29-824 and shall be heard by a single judge sitting at chambers, provided, however, that upon ultimate appeal to the full Nebraska Supreme Court, the defendant may challenge the correctness of the order by the single judge by preserving the question in the motion for new trial, as prescribed in § 29-824.

11. Death Penalty: Constitutional Law. The death penalty, when properly imposed by a state, does not violate either the eighth or fourteenth amendments of the United States Constitution or Neb. Const. art. 1, § 9.

12. Death Penalty: Constitutional Law: Juries. Jury sentencing in a capital case is not constitutionally required.

Heard before Krivosha, C.J., Boslaugh, Brodkey, and White, JJ., and Colwell and Fahrnbruch, District Judges.

KRIVOSHA, C.J.

The instant appeals, though involving two separate cases, result from a consolidated trial arising out of a common crime and involve essentially identical issues. For that reason, we have elected to, likewise, consolidate the two cases for purposes of our decision.

On July 1, 1977, appellants Peter Hochstein (Hochstein) and C. Michael Anderson (Anderson) were separately charged by information in the county court of Douglas County, Nebraska, with first degree murder in the death of Ronald J. Abboud (Abboud). Hochstein and Anderson were bound over to the District Court for Douglas County, Nebraska, which, after consolidating the matters, heard and ruled on numerous pretrial motions, some of which are involved in this appeal. After trial, both appellants were found guilty as charged and sentenced by a three-judge panel to be executed. Hochstein and Anderson both appeal from the conviction and sentence, assigning a number of errors which we shall individually discuss hereafter. We have, however, carefully and meticulously reviewed this matter and conclude that it is, in all respects, correct. We, therefore, affirm both the conviction and the sentence.

The body of Abboud was discovered on November 2, 1975, along a creek bank in a rural area west of Omaha, Nebraska. Abboud had been reported missing and had last been seen on October 29, 1975. The investigation, including the autopsy

conducted on the body of Abboud, disclosed that Abboud had been shot in the head, back, and neck with a .22 caliber pistol. Soon after the body was found, the investigation led police to suspect both Hochstein and Anderson as being involved in the killing. Anderson had been employed by Abboud's company, Commercial Realty, for several years and Hochstein was a close friend of Anderson. Despite the suspicions, however, the authorities had been unable to effect an arrest of any suspect by June of 1976.

At that time, the Abboud family hired a private detective by the name of Dennis Whelan (Whelan). Whelan was specifically instructed by the Abboud family that he was to establish the guilt or innocence of Anderson and Hochstein. Likewise, at the time of the hiring by the Abboud family, Whelan was further made aware of a Lon Reams (Reams) who was known to have a business and social relationship with Anderson.

An examination of the police reports prepared up to the time of Whelan's hiring by the Abboud family disclosed that the police considered Reams as a possible witness to an incriminating statement made by Anderson concerning Abboud. Likewise, in a report dated November 10, 1975, it is shown that Reams was interviewed by the police and his name was again mentioned in a report dated May 20, 1976, as a business partner of Anderson's. Further, a report of June 29, 1976, discloses that the police, while searching for Anderson at his place of business, spoke briefly with Reams.

Whelan proceeded to investigate the murder through the means of interviews, visual surveillance, record checking,

and the reading of police reports which had been provided to him by an unknown source.

Beginning on November 12, 1976, Whelan began installing and monitoring electronic surveillance devices in the apartments of Anderson and Hochstein. This continued until April 21, 1977.

In December of 1976, Whelan learned that a woman he knew, Mila Dickman (Dickman), was employed by Bruce Miller and Anderson and that she was closely associated with Reams. Whelan interviewed her and told her of his suspicions that Reams, Anderson, and Hochstein were the persons who had killed Abboud. Dickman agreed to aid Whelan by passing on any information that she might learn concerning the three. Whelan and Dickman subsequently met on frequent occasions and Dickman told Whelan that Reams felt that he was being edged out of his association with Anderson and Hochstein.

On April 15, 1977, Whelan met with Samuel Cooper (Cooper) of the Douglas county attorney's office. At this meeting, which lasted approximately 3 hours, Whelan informed Cooper of his own investigation, including the illegal wiretaps, and played portions of at least one of the taped conversations for Cooper. He also told Cooper that he felt Reams was directly involved in the Abboud homicide, along with Anderson and Hochstein. Cooper later testifed at a hearing on a motion to suppress that Whelan's information concerning Reams gave him nothing more then he already had.

During their meeting on April 15, 1977, Whelan was specifically instructed by Cooper that he was to terminate

his illegal wiretapping. Cooper furthermore implied to Whelan that, if Reams would talk to Cooper, that Cooper would consider granting Reams immunity from prosecution.

On June 7, 1977, Reams was interviewed by Cooper and Douglas County Attorney Donald Knowles. Reams denied having any knowledge of or involvement in the Abboud murder. Whelan was again contacted by Cooper and asked to do whatever he could to assure Reams that, if he was not directly involved in the murder, but had knowledge of it, he would be treated fairly by the county attorney's office.

On June 13, 1977, Whelan talked to Reams in the presence of Dickman and advised Reams to tell the county attorney what he knew about the murder. Whelan told Reams that he had "conversations" which indicated Anderson and Hochstein were planning to do away with Reams. Whelan later testified that he tried to play on Reams' paranoia and that he told him "the case was made and that his only chance . . . was to make a deal . . . . I tried to bluff him, I tried to scare him." The record does not disclose that any such conversation between Hochstein and Anderson actually occurred, but rather established that Whelan did not hear and record such conversations between Hochstein and Anderson and, in fact, was bluffing Reams. Reams told Whelan that he would think it over and contact an attorney.

On June 15, 1977, Reams and Whelan met again and Reams told Whelan that he had contacted an attorney and asked him to get in touch with Cooper. Also on June 15, 1977, when Whelan

and Reams met again, Reams admitted that he was involved in the murder. That afternoon, he and his attorney met with Cooper and Reams gave a complete statement about the murder, naming Hochstein and Anderson as the persons responsible and acknowledging the part he, himself, had played in the murder. Reams' testimony at the trial was central in obtaining the guilty verdicts.

Reams' testimony at trial disclosed that he and Anderson had met early in 1975. In May of that year, Anderson began to tell Reams of his negative feelings towards his employer, Abboud, and he began to speak more often about his dislike for Abboud due to Abboud's alleged unfair business dealings and intimated that he would like to do something about it.

About a week before the murder, Anderson first revealed an intention to take some action toward Abboud. Anderson, Hochstein, and Reams had gathered at Reams' house to drink beer and the conversation turned to Abboud. The three began discussing the possible means of eliminating Abboud, going from hiring local or outside "hit men," to the use of a knife, to the use of explosives. Again, just a few days later, the three met at Reams' house and began to seriously plan out the murder. Hochstein, after fixing a malfunctioning Ruger pistol belonging to Reams, suggested that he might "do it," meaning murder Abboud, because he needed money. He mentioned a price of $1,500 which Anderson agreed upon as fair. The parties then planned out how Hochstein could get Abboud off alone. They decided that Hochstein should play the part of a prospective purchaser of real estate to whom

Abboud would be asked to show some property listed with his company. Hochstein was to use the name "Jim Parker" in his dealings with Abboud. Anderson knew of a piece of agricultural property listed with Commercial Realty located at about 168th and Q Streets which might be "a good spot." They all then got into Hochstein's car and drove out to the property in question. Although they remained in the car, Anderson described the lay of the land for them. Hochstein kept the Ruger pistol after this meeting.

Reams further testified that the "hit date" was orginally scheduled to be Tuesday, October 28, 1975. The previous day, Anderson and Reams had gone to the bank to borrow the $1,500 necessary to pay Hochstein. The money was given to Hochstein that afternoon.

The plan was for Hochstein to arrange an appointment with Abboud to see the real estate listed by Commercial Realty. Once they were alone on the property, the murder was to take place. Hochstein was then to call Reams who, in turn, would call and inform Anderson. Then Reams was to go and pick up Hochstein. Hochstein arranged the appointment with Abboud for Tuesday afternoon, October 28, 1975. However, Reams later received a telephone call from Hochstein, presumably from Abboud's car telephone, identifying himself as "Jim Parker." Hochstein informed Reams that he was with a few gentlemen. Later that day, he again called, this time from the Smuggler's Inn, a restaurant, where he had been left by Abboud. Reams picked up Anderson and went to pick up Hochstein, who told him that he hadn't been able to carry out the plan

because there had been two other people in the car. However, Hochstein was going to call Abboud to set up another meeting for the next day.

The next morning, October 29, 1975, Hochstein again called Abboud and set up an appointment. The next contact Reams had with Hochstein was a telephone call at about 4 or 4:30 that afternoon. Hochstein simply said, "It's done," and told Reams to pick him up at Westroads, a shopping center located in Omaha. Reams called Anderson and then went out to pick up Hochstein. The body of Abboud was found 3 days later.

After Hochstein and Anderson were bound over to the District Court for Douglas County, Nebraska, they moved to suppress all evidence obtained as a result of the illegal electronic surveillance undertaken by Whelan. After a hearing on the matter, the Honorable John T. Grant ordered the suppression of a substantial portion of the State's evidence, including the testimony of Lon Reams.

Pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1979), the State appealed the decision to a single judge of the Nebraska Supreme Court who, on April 12, 1978, rendered a judgment and opinion affirming the District Court's order except as to the testimony of Lon Reams. As to the Reams' testimony, the single judge held that the evidence was admissible.

Thereafter, the case proceeded to trial, after which the jury returned a verdict of guilty of murder in the first degree against each appellant. A three-judge panel was

appointed as prescribed by statute and, after hearing, the panel entered its order of sentence imposing the death penalty upon each appellant. It is from these verdicts and sentences that the appellants appeal, claiming a number of errors.

The first, and perhaps the most serious, assignment of error raised by appellants has to do with the testimony of Lon Reams. Specifically, the appellants maintain that it was error not to suppress the testimony of Reams. However, our examination of the evidence and the law in that regard leads us to the conclusion that it was not error to permit Reams to testify. We reach our decision both because his identity was not made known by reason of an illegal wiretap and because his decision to testify was voluntary, thereby attenuating the taint, if any, of the illegal wiretap.

Appellants maintain that Reams' testimony was, indeed, the "fruit of the poisonous tree" obtained by Whelan and, as such, should not have been permitted. Their argument is based upon the provisions of Neb. Rev. Stat. § 86-712 (Reissue 1976) which is essentially identical to Title 18 U.S.C. § 2515 (1976) and reads, in part, as follows: "No part of the contents of any intercepted wire or oral communication and no evidence derived therefrom may be received in evidence in any trial . . . if the disclosure of that information would be in violation of Chapter 86, article 7."

It is argued to us that the provisions of the above-cited statute should apply without regard to whether the illegal interception is made by a private citizen or a

government agent. There appear to be no cases directly addressing the question of what happens when the wiretap is conducted by a private citizen, as opposed to a government agent. However, the facts of this case do not require us to decide that issue at this time. Regardless of who instituted the illegal wiretaps in the instant case, the only questions under either the cited act or the fourth amendment necessary for our decision are (1) Was the existence of Reams as a potential witness known by means other then the illegal wiretap? and (2) Did Reams voluntarily agree to testify? If the answer to either of those questions is in the affirmative, then all of the argument concerning the meaning and effect of § 86-712 is of no moment.

In all of the cases cited to us by appellants in which the live witness' testimony was suppressed, the existence of the witness was first brought to the government's attention by reason of the illegal wiretap or search. The evidence in each of those cases clearly points out that, but for the illegal activity conducted by the government, the existence of the witness would never have been known to the government. United States v. Tane, 329 F.2d 848 (2d Cir. 1964); United States v. Huss, 482 F.2d 38 (2d Cir. 1973); Commonwealth v. Cephas, 447 Pa. 500, 291 A.2d 106 (1972); United States v. Cruz, 581 F.2d 535 (5th Cir. 1978). The prohibition against using the live witness is not, however, based upon a "per se" rule. If it appears from the evidence that the identity of the witness was obtained from a legal source, the fact that the identity of the witness was also improperly acquired by

illegal wiretapping does not render the witness' testimony inadmissible. In Nardone v. United States, 308 U.S. 338, 341 (1939), the United States Supreme Court, in reviewing the prohibition against using improperly obtained testimony under § 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605 (1934), speaking through Mr. Justice Frankfurter, said:

"Here, as in the Silverthorne case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively. [Citation omitted.]

"In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation--fair to the intendment of § 605, but fair also to the purposes of the criminal law--ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that the wire-tapping was unlawfully employed. Once that is established--as was plainly done here--the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him

was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin."

In the Tane case, relied upon by appellants, unlike the instant case, the identity of the witness was derived from the wiretap. The witness was unwilling to testify or even admit to making any unlawful payments until possession of tapes of a certain conversation was revealed by the assistant district attorney. In the instant case, Reams' identity was not derived from any wiretap and his willingness to testify, as will be discussed in a moment, was not dependent upon any wiretap which implicated Reams in the crime.

Appellants have further cited to us the case of United States v. Marder, 474 F.2d 1192 (5th Cir. 1973), in support of their position that Reams' testimony should have been suppressed as a fruit of the poisonous tree. The Marder decision, however, stands for a contrary rule. The court in Marder said:

"We do not adopt a per se rule which would ipso facto preclude the utilization of all testimony of a witness identified as a consequence of an illegal search. Many extenuating circumstances may affect the appropriateness of the introduction of such testimony, which would not pertain to an inanimate object seized by an illegal search.

. . . .

". . . Several factors should be considered in deciding whether the attenuation rule is applicable to 'live testimony.' The unpredictability of the human will, which is necessarily

involved in the use of a witness to prove essential elements of a crime, forecloses the adoption of any rigid rules. 'Thus, each case must be examined on an ad hoc basis, considering the particular facts presented, rather than on any sweeping general concept of "live testimony" as such.' [Citation omitted.]" Id. at 1196. See, also, United States v. Holsey, 437 F.2d 250 (10th Cir. 1970); Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963).

The record clearly establishes that the witness Reams was not unknown to either Whelan or the State prior to the illegal wiretaps. When Whelan was first hired by the Abboud family, he was specially advised that Reams may be a suspect or at least a party with information. The police, though perhaps not as vigorously as they might, had pursued Reams and made inquiry concerning his having heard Anderson make some threatening statements concerning Abboud. Whelan arranged a contact with Mila Dickman who, in turn, kept Whelan advised about the fact that Reams was getting nervous and felt he was being "edged out" of his association with Anderson and Hochstein. There is no evidence in the record to support the position that, but for the illegal wiretap, either the existence of Reams or the fact that he might testify would have been unknown.

The record establishes the fact that nothing heard during the illegal wiretap led the State to Reams. Exhibit 43 best illustrates this fact. Exhibit 43 is a report made by Whelan to the Abboud family and reads, in part:

"Monday, 6-13-77

talked with Cooper, aware of Lon's whereabouts. Cooper still thinks Lon was not involved but knows what happened. We decided that Mila and I should talk with Lon and make a deal.

". . . Lon had been at her home all week-end and was acting very nervous, upset over something. Plan decided on: Mila is to talk with Reams this afternoon and tell him of her involvement with me and that the case is coming down with Reams as a conspirator; he will be charged with murder. Also, it is now known that Anderson, Pete and Leo are going to kill Lon. Mila also believed this and was placed in the middle. Both had to make a decision--Reams arrested or Reams killed. Mila agreed to talk with Lon and go for the confession. She agreed to give Lon enough information so that he would believe that he had no out and that Cooper had enough for the arrest."

Of course, none of the "facts" to be related to Reams were true and were not obtained as a result of any illegal wiretap.

We, therefore, conclude that the identity of Reams was made known to the State by independent means and was not the sole result of an illegal wiretap. It was, therefore, not the fruit of a poisonous tree and it was not error for the court to permit Reams' live testimony to be admitted into evidence.

Having, therefore, answered the first question posed at the outset of this discussion in the affirmative, we now turn to the second question. That is, regardless of the

illegal wiretaps, did Reams voluntarily come forward and offer to testify so as to attenuate any taint, if such a taint existed? Again, we believe that this question must be answered in the affirmative.

When Reams was first contacted by the county attorney's office, he denied any knowledge of the crimes and refused to talk to Cooper.

It was only after Whelan told him that his life was in danger and that he should cooperate in return for immunity, that he sought out counsel. After he consulted with counsel of his choice, he apparently came to the conclusion that he was being offered a chance of a lifetime and came forward and offered to testify in return for the promise of immunity. To be sure, Whelan had no evidence that Reams was to be killed and was lying to Reams. In his testimony, Whelan stated as follows:

"Q. Did you obtain any information with respect to Mr. Reams?

"A. I don't think so, no.

"Q. Did you reveal any of the conversations off that wire tap to Mr. Reams?

"A. No, sir.

"Q. Did you ever at any time play any of the conversations to Mr. Reams?

"A. Never.

"Q. And you testified that you implied to Mila and to Lon Reams that he was in danger?

"A. I implied that, yes, to Lon and Mila.

"Q. In danger from what?

"A. In danger from his associates.

"Q. Did you have any factual basis for that?

"A. No, sir. All I was trying to do was play on his own paranoia at the time. . . . I would have to say that a lot of it was made up. I was bluffing him. . . .

"Q. Now, you testified that I [Cooper] didn't authorize you to grant immunity to anybody. That is correct, isn't it?

"A. That is correct.

"Q. But it was also clear from our conversation that that was the intent if Mr. Reams was to come forward, wasn't it?

"A. That was what I drew from it.

"Q. And that's basically what you told Mr. Reams, wasn't it?

"A. I told him that I thought he should get a lawyer and, through the lawyer, make a deal for immunity."

Reams could easily have asked to hear the alleged tapes. Such a request would have quickly disclosed that the tapes did not exist. Apparently, neither the threats nor the tapes were a moving factor in Reams' decision to testify. On advice of counsel, the offer of immunity undoubtedly did more than anything else to cause Reams to come forward. Reams had every opportunity to reflect on the entire matter and to consult with his attorney before voluntarily offering to testify.

The fact that Whelan may have overheard a conversation between Hochstein and Anderson in which Reams was mentioned

did not affect the State's right to use the information against Reams. In Goldstein v. United States, 316 U.S. 114 (1942), it was held that the use of an intercepted telephone message to induce witnesses to testify in a criminal prosecution, even though it may constitute a violation of the provisions of § 605 of the Federal Communications Act, 47 U.S.C. § 605 (1976), forbidding the use of intercepted communications, does not render such testimony inadmissible against a person not a party to the message where no use is made at the trial, either of the message itself or of any information contained therein. Likewise, in the case of United States v. Scotten, 428 F.Supp. 256 (D. Nev. 1976), the United States District Court for the District of Nevada held that, although evidence seized at an illegal search of a warehouse had been suppressed as to the defendant because of his proprietary interest in the premises, testimony of an unindicted coconspirator who became a government witness would not be suppressed with respect to the defendant although the seized evidence which was useable against the defendant was a substantial factor leading to the decision of the unindicted coconspirator to cooperate with the government. The court found that the decision of the witness to turn state's evidence was an independent act of free will which was not affected or obtained in any respect by wrongful exploitation of evidence seized or obtained in violation of his right of privacy.

Reams had much to gain by agreeing to testify in return for the offer of immunity. To suggest that his offer to testify was not voluntary under the facts is to attempt to

ignore the facts as detailed earlier in this opinion. It was, indeed, voluntary and most beneficial to Reams. We are, therefore, unable to agre with appellants that Reams' live, in-court, testimony should have been suppressed. It was clearly voluntarily and properly admissible, though admittedly damaging to the appellants.

Having so disposed of that issue, we shall now proceed to examine the remainder of the issues raised by appellants. Appellant Hochstein claims that the trial court erred in failing to grant his oral motion for severance. The cases against Hochstein and Anderson, filed separately, were ordered consolidated by the trial court on September 12, 1977. We have frequently held that the ruling of a trial court upon a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion. State v. Bazer, 189 Neb. 711, 204 N.W.2d 799 (1973). The same rule applies with regard to a motion to sever. See State v. Cook, 182 Neb. 684, 157 N.W.2d 151 (1968). Furthermore, we have held that it is the duty of one challenging a joint trial to demonstrate how and in what manner he was prejudiced. See Neb. Rev. Stat. § 29-2002(4) (Reissue 1979) and State v. Rice, 188 Neb. 728, 199 N.W.2d 480 (1972). Hochstein made no such showing at the time of the oral motion and an examination of the record fails to disclose any such prejudice. We find no evidence that the trial court abused its discretion in granting the State's motion for consolidation and denying Hochstein's motion to sever. The assignment of error is overruled.

Appellants next contend that the trial court erred in not granting appellants' request for a mistrial based upon the prosecution's "death qualifying" the jury panel. Unfortunately, the examination of the jury panel was not recorded. However, the court reconstructed what took place immediately after the incident in question during an in camera discussion. It appears that the jury panel was advised that the death penalty was a possible sentence which could be imposed for the crimes charged in the instant cases. Thereafter, a panel member was asked if she believed in the death penalty. She replied that she did not and further advised that her view opposing the death penalty might color her judgment in reaching a verdict of guilty or not guilty. The court proceeded then to further question the panel member and determined that her feelings about the death penalty would, indeed, influence her determination of the factual question of guilt or innocence. She was, therefore, excused from the panel. Appellants argue that this exclusion amounted to "death qualifying" the jury, contrary to the mandate of the United States Supreme Court in the case of Witherspoon v. Illinois, 391 U.S. 510 (1968). We believe, however, that appellants have misconstrued the holding in Witherspoon. The Witherspoon case held that: "sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding venireman for cause simply because they voiced general objections to the death penalty . . . ." Id. at 522. In so holding, however, the Court, in Witherspoon, specifically stated that the issue decided did not concern

the exclusion of prospective jurors who stated that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. The exclusion of the panel member in the instant case was not based upon the panel member's refusal to impose the death penalty, but upon her admission that, because she objected to the death penalty, she could not fairly and impartially determine the guilt or innocence of the appellants, even though she would not be called upon to impose the sentence. In State v. Kirby, 185 Neb. 240, 175 N.W.2d 87 (1970), we held that one who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the laws of the state must be excused for cause. The trial court correctly perceived that to be the case and properly excused the juror. Such assignment of error must be overruled.

Appellants next contend that the trial court erred in overruling their motion for mistrial after Reams mentioned the word "polygraph" during redirect examination. Counsel for both Anderson and Hochstein immediately objected and, during an in camera hearing, moved for a mistrial on the basis that the witness Reams had mentioned the word "polygraph" in the presence of the jury. The testimony did not indicate whether Reams had ever taken a polygraph test or, if so, what results were obtained.

The trial court overruled the motion for mistrial but, before proceeding further with the trial, instructed the jury, in part, as follows: "The jury is instructed to pay no

attention to either the question or the answer as the matters made reference to have no place in a court of law. There is no factual matter at all in this case in any regard to the subject of polygraph. There will be no further reference to that subject in the trial." While it is true that the results of a polygraph test are not admissible in evidence, State v. Temple, 192 Neb. 442, 222 N.W.2d 356 (1974), in the instant case, there was no testimony concerning the results of a polygraph test. The mere mention of the word "polygraph," absent more, does not constitute prejudicial error. Appellants have failed to disclose how or in what manner the use of the word "polygraph" was prejudicial under the circumstances and we are unable to see how the appellants could have been prejudiced by the mention of the word "polygraph." The assigned error must be overruled.

Anderson and Hochstein next maintain that the trial court erred in failing to grant their request for a mistrial based upon the State's alleged improper highlighting of appellants' failure to testify. Both appellants maintain that the State made certain remarks during the voir dire examination which, when taken together with a later newspaper article, denied to the appellants a fair trial. The record discloses, however, that neither appellant objected to remarks made by the prosecution at the time they were made, nor did either defendant move for a mistrial based upon those remarks. We have frequently held that a party may not raise alleged misconduct of adverse counsel on appeal where, despite knowledge of the alleged misconduct, the party claiming the

misconduct failed to request a mistrial and instead agreed to take the chances of a favorable verdict. Vacanti v. Montes, 180 Neb. 232, 142 N.W.2d 318 (1966). In addition, however, an examination of the alleged statements fails to disclose how or in what manner they were prejudicial or improper. With regard to the matter of the newspaper article, likewise, the claim is without merit. An article which appeared in the Omaha World Herald the morning before the case was submitted to the jury for its consideration read, in part, as follows: "By pleading innocent, Hochstein and Anderson have denied involvement in the crime, but their failure to testify meant jurors never heard either deny the charges." Appellants' claim in this regard fails on at least two grounds. In the first instance, there is no evidence in the record to indicate that the jury failed to follow the admonition given by the trial court not to read newspaper accounts and, in fact, read the article, but, more importantly, there is nothing in the statement itself which could, in any manner, be said to have prejudiced the appellants. The article recited the truth simply and factually. There is no evidence of prejudice. The assignment is overruled.

Hochstein and Anderson next maintain the trial court committed error in failing, on the court's own motion, to change the venue of the trial and to order the jury sequestered during trial. The record discloses that appellants requested neither action from the court. As with the earlier errors assigned, appellants have failed to disclose how or in what manner they were prejudiced by reason of the trial court's

failure to change the location of the trial or sequester the jury on its own motion. We have previously held that a motion for change of venue or to sequester the jury is directed to the sound discretion of the trial court and, in the absence of an abuse of discretion, its ruling will not be disturbed on appeal. State v. Simpson, 200 Neb. 823, 265 N.W.2d 681 (1978); State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979). There is no evidence that the failure of the court to act on its own motion, if such a duty even existed, was an abuse of discretion. The assignment of error must be overruled.

Anderson and Hochstein next contend that the trial court failed to assure them the right to a fair trial because two pretrial hearings were held in their absence. The first hearing concerned a motion by Anderson to dismiss. While the record shows that Anderson was not present at this hearing, he was represented by counsel. Further, the record reveals no request by Anderson's counsel that Anderson be present or any objection to proceeding without Anderson's being present. With regard to the second hearing, it appears it was upon a motion made by Anderson's counsel as to whether an evidentiary hearing should be held to consider the admissibility of allegedly tainted evidence. At neither of these hearings was evidence adduced. They were held simply to give Anderson's and Hochstein's attorneys an opportunity to argue the law to the court. The general rule is that an accused has the right to be present at all stages of the trial when his absence might frustrate the fairness

of the proceedings. State v. Bear Runner, 198 Neb. 368, 252 N.W.2d 638 (1977); Faretta v. California, 422 U.S. 806 (1975). We fail to see how Anderson's or Hochstein's absence at a time when their attorneys were arguing matters of law to the court could frustrate the fairness of the proceedings. Likewise, neither appellant is able to point out to us how his absence frustrated the fairness of the proceedings. We have earlier held that a defendant has no constitutional right to be present at the hearing on a motion for a new trial. State v. Wells, 197 Neb. 584, 249 N.W.2d 904 (1977). We fail to see how the appellants' absence from these two hearings should be treated any differently. The assignment of error must be overruled.

Appellants' next assignment of error is that the trial court erred in failing to give appellants' requested instruction concerning "reasonable doubt." The record reflects that the trial court, over objection by appellants, instructed the jury on "reasonable doubt" by following the pattern jury instruction NJI 14.08. Appellants maintain that the instruction as approved in NJI is confusing, contradictory, and a misstatement of the traditional understanding of "reasonable doubt." Our examination of the instruction fails to reveal that it does not properly reflect the rule in Nebraska concerning reasonable doubt. The NJI on "reasonable doubt" has been frequently approved by this court. State v. Rice, supra; Haswell v. State, 167 Neb. 169, 92 N.W.2d 161 (1958). Moreover, when all of the instructions given by the court are taken together, they are not, in any manner,

misleading and they adequately cover the issues raised. There is, therefore, no prejudicial error. State v. Bear Runner, supra; State v. Pratt, 197 Neb. 390, 249 N.W.2d 500 (1977).

Appellants further assign as error the manner in which the State appealed the trial court's suppression of certain of the evidence prior to trial. In essence, appellants argue that it was error to permit the interlocutory appeal to be heard by a single judge as provided for in § 29-824 and that, instead, the appeal was required, under the law, to be heard by the entire court sitting en banc. Section 29-824 specifically provides, in part, as follows: "In addition to any other right to appeal, the state shall have the right to appeal from an order granting a motion . . . to suppress evidence in the manner herein provided." (Emphasis supplied.) The manner provided for in the quoted section is review by a single judge of the Nebraska Supreme Court at chambers. The appellants maintain that, under the provisions of Neb. Rev. Stat. § 86-705(12) (Reissue 1976), the State was required to appeal to the entire court and we should now remand the matter for a full court hearing. There are, however, several defects in that argument. In the first place, we have now reviewed the entire matter while sitting en banc. No purpose could be served in ordering a new trial so that the State could again appeal to this court en banc. We have disposed of the entire matter at this time. Furthermore, § 86-705(12) reads, in part, as follows: "In addition to any other right to appeal, the Attorney General . . . shall have the

right to appeal from an order granting a motion to suppress made under subsection (11) of this section . . . ." (Emphasis supplied.) Section 86-705(12) makes it clear that the right to appeal at the specific time is not exclusive, but is in addition to any other right of appeal. Section 29-824 and related applicable sections leave no question that they are all a part of "search and seizure" and quite clearly authorize the State to appeal to a single judge of the Nebraska Supreme Court prior to trial in order to permit the question of the suppression of evidence to be tested quickly before trial. The entire court is afforded a subsequent opportunity to review the issue when the appeal on the merits is brought to the entire court. There is nothing vague or unclear about such a procedure.

No procedure for the manner of appeal is prescribed in § 86-705(12). We see little reason why an interlocutory appeal concerning the suppression of evidence should be heard by a single judge of this court sitting at chambers if brought pursuant to § 29-824, but by the entire court sitting en banc if brought under the provisions of § 86-205(12). We, therefore, hold that the procedure for appealing from the provisions of either § 29-824 or § 86-705(12) shall be in accordance with § 29-824 and such appeal shall be heard by a single judge sitting at chambers, provided, however, that upon ultimate appeal to the Nebraska Supreme Court, the defendant may again challenge the correctness of the order by a single judge of the Supreme Court by preserving the question in the motion for new trial as prescribed in § 29-

824. We, therefore, overrule the appellants' assignment of error in that regard.

Appellants' last claim goes to the imposition of the death penalty and is presented to us in several parts, some of which have already been answered by this court. The first claim is that the Nebraska death penalty constitutes cruel and unusual punishment, violating the eighth and fourteenth amendments to the United States Constitution and Neb. Const. art. 1, § 9. We may dispose of that claim based upon several recent decisions by both this court and the Supreme Court of the United States. Each has held that the death penalty, when properly imposed by a state, does not violate either the eighth or fourteenth amendment of the United States Constitution or Neb. Const. art. 1, § 9. See, State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977); State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977); State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979); State v. Otey, 205 Neb. 90, 287 N.W.2d 36 (1979); Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Appellants further maintain that the Nebraska death penalty, imposed by the court rather than a jury, violates the sixth and fourteenth amendments of the United States Constitution and Neb. Const. art. 1, § 11, in that it denies the accused the right to trial by jury and the right to confront his accuser. As we noted in State v. Simants, 197 Neb. 549, 558, 250 N.W.2d 881, 887 (1977): "The United States Supreme Court, in Proffitt v. Florida, 428 U. S. 242,

96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), has held that jury sentencing in a capital case is not constitutionally required."

Likewise, the United States Supreme Court, in Gregg v. Georgia, supra, addressed the question of evidentiary formalism under the bifurcated system of capital sentencing. It is clear from the Gregg decision that the sentencing phase of the process is separate and apart from the trial phase and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence. We are unable to find any requirement in the law that a sentencing court may consider only information adduced at trial when exercising discretion in imposing sentence. Likewise, we find no constitutional requirement to permit one convicted the right to confront all who might give information to be used by the sentencing court. Such a requirement goes far beyond any constitutional mandate.

Appellants further maintain that the Nebraska death penalty statutes constitute cruel and unusual punishment because the standards for establishing aggravating and mitigating circumstances are vague and indefinite.

While one may argue that whenever guidelines are established for a court to use in making decisions, the standards will be in general terms, it appears that the United States Supreme Court, in the Gregg case, has approved such guidelines saying, "While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a

sentence that fairly can be called capricious or arbitrary." Id. at 193-95. We have previously approved the standards set out in our statute on aggravating and mitigating standards. See State v. Rust, supra.

Appellants next maintain that the statutes authorizing the imposition of the death penalty in a case of this nature, violate the eighth and fourteenth amendments of the United States Constitution and Neb. Const. art. 1, § 9, because they limit the mitigating factors which may be considered by the sentencing body. We have already and recently disposed of that argument in State v. Holtan, 205 Neb. 314, 287 N.W.2d 671 (1980), when we held that our statute prescribing consideration of aggravating and mitigating circumstances was to be interpreted so as to permit consideration by the court of all aggravating and mitigating circumstances and not just those set forth in the statute, saying specifically: "To the extent that there may be any question we now hold that the trial court shall, in addition to considering the aggravating and mitigating circumstances set forth in section 29-2523, R. R. S. 1943, likewise consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to have probative value as to the character of the defendant and shall consider them as a mitigating factor though not specifically a mitigating circumstance as set forth in section 29-2523." Id. at 318-19 (emphasis in original).

Lastly, appellants maintain that the death penalty was improperly imposed in this case because of a misapplication

of the aggravating and mitigating circumstances. To the contrary, when this case is compared to the other 32 cases noted by this court in State v. Williams, supra, and examined in light of Neb. Rev. Stat. § 29-2523 (Reissue 1979), it clearly speaks in favor of imposing the death penalty. While the author of this opinion has heretofore disagreed with imposing the death penalty in certain of the cases reviewed by this court, finding that they were not sufficiently different from those cases in which the death penalty had not been imposed, the author has no such difficulty in this case. The appellants' absolute and total disregard for the value of human life as displayed by the evidence in this case makes it separate and different from any other case previously considered by this court. Both Anderson and Hochstein, though they had ample time in which to "cool down" and reflect upon what they were planning to do, proceeded without the slightest regard for the fact that they were taking a human life. Hochstein's willingness to kill another for $1,500 displays how little he valued another's life. The evidence in this case of the careful, deliberate premeditation and malice aforethought makes this type of crime exactly the type contemplated by the "aggravating and mitigating circumstances" standards of our statutes.

For Hochstein and Anderson, the killing of Abboud was a business transaction and a most aggravating circumstance within the meaning of § 29-2523. The death penalty for them is an occupational hazard. If ever a situation exists in which the imposition of a death penalty is appropriate, it is

clearly in the case of "killers for hire." A careful review of the entire record in light of both § 29-2523 and the previous decisions of this court discloses that there are no mitigating factors in this case which would justify not imposing the most severe penalty for the most heinous crime--the absolute and willful killing of a human for money. We believe the imposition of the death penalty in this case is amply justified. Having, therefore, found no errors requiring a new trial, we affirm the conviction and the sentence of death imposed.

AFFIRMED.

Clinton and Hastings, JJ., not participating.

OFFICE OF CLERK OF THE SUPREME COURT

LINCOLN, NE 68509 DEC 7 1983

IN CASE OF State v. Hochstein, No. 42302

THE FOLLOWING ORDERS HAVE BEEN MADE:

JUDGMENT Motion of appellant for rehearing overruled; motion of appellant for stay of issuance of mandate sustained; mandate stayed pending intended review by United States Supreme Court

OPINION BY

RESPECTFULLY, LARRY D. DONELSON, CLERK.

APPENDIX "B"

ARTICLE [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

The thirteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-eighth Congress, on the 31st day of January, 1865, and was declared, in a proclamation of the Secretary of State, dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States, viz: Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia.

SECTION 2. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 3. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The fourteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-ninth Congress, on the 13th of June, 1866. On the 21st of July, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: *Therefore, Resolved*, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated the 28th of July, 1868, declaring that the proposed fourteenth amendment had been ratified, in the manner hereinafter mentioned, by the legislatures of thirty of the thirty-six States, viz: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (and the legislature of the same State passed a resolution in April, 1868, to withdraw its consent to it); Oregon, September 19, 1866; Vermont, October 30, 1866; Georgia rejected it November 13, 1866, and ratified it July 21, 1868; North Carolina rejected it December 4, 1866, and ratified it July 4, 1868; South Carolina rejected it December 20, 1866, and ratified it July 9, 1868; New York ratified it January 10, 1867, Ohio ratified it January 4, 1867 (and the legislature of the same State passed a resolution in January, 1868, to withdraw its consent to it); Illinois ratified it January 15, 1867; West Virginia, January 16, 1867; Kansas, January 11, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Missouri, January 25, 1867; Indiana, January 23, 1867; Minnesota, January 16, 1867; Rhode Island, February 7, 1867; Wisconsin, February 17, 1867; Pennsylvania, February 12, 1867; Michigan, January 16, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, March 16, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868, and Alabama, July 13, 1868. Georgia again ratified the amendment February 2, 1870. Texas rejected it November 1, 1866, and ratified it February 18, 1870. Virginia rejected it January 9, 1867, and ratified it October 8, 1869. The amendment was rejected by Kentucky January 10, 1867, by Delaware February 8, 1867, but subsequently ratified February 12, 1901, by Maryland March 23, 1867, but subsequently ratified April 4 1959.

California ratified this amendment May 6, 1959.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter. (Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 216.)

APPENDIX "D"

29-2519. Statement of intent. The Legislature hereby finds that it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death; that the imposition of the death penalty in every instance of the commission of the crimes specified in section 28-303 fails to allow for mitigating factors which may dictate against the penalty of death; and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court. The Legislature therefore determines that the death penalty should be imposed only for the crimes set forth in section 28-303 and, in addition, that it shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-2520 to 29-2524.

Source: Laws 1973, LB 268, § 1; Laws 1978, LB 748, § 21.

The Nebraska death penalty statutes, sections 29-2519 to 29-2546, do not constitute cruel and unusual punishment and are not in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States or the Bill of Rights of the Constitution of Nebraska. State v. Simants, 197 Neb. 549, 250 N.W.2d 881; State v. Rust, 197 Neb. 528, 250 N.W.2d 867; State v. Stewart, 197 Neb. 497, 250 N.W.2d 849.

29-2520. Murder; person found guilty; sentence; determination. Whenever any person is found guilty of a violation of section 28-303, the district court shall within seven days fix a date for hearing on determination of the sentence to be imposed. Such determination shall be made by: (1) The judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification from the clerk of the court in which the finding of guilty was entered.

Source: Laws 1973, LB 268, § 5; Laws 1978, LB 748, § 22.

District court shall set date for hearing on determination of sentence within seven days of defendant's conviction of murder. State v. Rust, 197 Neb. 528, 250 N.W.2d 867; State v. Stewart, 197 Neb. 497, 250 N.W.2d 849.

29-2521. Determination of sentence; procedure. In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The court shall set forth the general order of procedure at the outset of the sentence determination proceeding.

Source: Laws 1973, LB 268, § 6.

Hearing on determination of sentence shall include written findings, proven beyond a reasonable doubt, identifying any aggravating and mitigating circumstances or other relevant facts. State v. Simants, 197 Neb. 549, 250 N.W.2d 881; State v. Rust, 197 Neb. 528, 250 N.W.2d 867; State v. Stewart, 197 Neb. 497, 250 N.W.2d 849.

29-2521.01. Legislative findings. The Legislature hereby finds that:

(1) Life is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity;

(2) The death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria;

(3) State law should be applied uniformly throughout the state and since the death penalty is a statewide law an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion;

(4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results; and

(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

Source: Laws 1978, LB 711, § 1.

29-2521.02. Criminal homicide cases: review and analysis by Supreme Court; manner. The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur.

Source: Laws 1978, LB 711, § 2.

29-2521.03. Criminal homicide cases; appeal; sentence; Supreme Court review. The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

Source: Laws 1978, LB 711, § 3.

29-2521.04. Criminal homicide cases: Supreme Court review and analyze; district court; provide records. Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

Source: Laws 1978, LB 711, § 4.

29-2522. Sentence; death; life imprisonment; determination of death in writing. After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

Source: Laws 1973, LB 268, § 7; Laws 1978, LB 711, § 5.

Death sentence upheld where defendant murdered six family members, including children, and sexually molested female victims. State v. Simants, 197 Neb. 549, 250 N.W.2d 881.

Death sentence not excessive for defendant with history of multiple convictions for bank robbery, first degree assault, and armed robbery, where defendant point-blank murdered and wounded unresisting robbery victims. State v. Holtan, 197 Neb. 541, 250 N.W.2d 876.

Death sentence imposed where twenty-three year old defendant with prior criminal convictions for aggravated assault and grand larceny killed civilian aiding police in the apprehension of defendant fleeing the scene of an armed robbery. State v. Rust, 196 Neb. 528, 250 N.W.2d 867.

District court's imposition of death sentence reduced to life imprisonment where sixteen-year old defendant with no prior criminal record killed victim instantaneously, without torture. State v. Stewart, 197 Neb. 497, 250 N.W.2d 849.

29-2523. Aggravating and mitigating circumstances, defined. The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

Source: Laws 1973, LB 268, § 8.

Prior record of multiple crimes of violence constituted an aggravating circumstance. State v. Peery, 199 Neb. 656, 261 N.W.2d 95.

Circumstances of victim's death, found bound and gagged when killed, constituted effort to conceal identity of perpetrator. State v. Peery, 199 Neb. 656, 261 N.W.2d 95.

Murder committed during act of robbery held not a murder for pecuniary gain herein. State v. Peery, 199 Neb. 656, 261 N.W.2d 95.

The facts establishing an aggravating circumstance must be proved beyond a reasonable doubt. Definitions of aggravating and mitigating circumstances discussed and interpreted. State v. Simants, 197 Neb. 549, 250 N.W.2d 881; State v. Holtan, 197 Neb. 544, 250 N.W.2d 876; State v. Rust, 197 Neb. 528, 250 N.W.2d 867; State v. Stewart, 197 Neb. 497, 250 N.W.2d 849.

86-712. Intercepted wire or oral communication; contents; evidence; when. No part of the contents of any intercepted wire or oral communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of Chapter 86, article 7.

Source: Laws 1976, LB 583, § 6.

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,
v.
C. MICHAEL ANDERSON,
Defendant.

Docket 99 No. 392
MEMORANDUM and ORDER

THE STATE OF NEBRASKA,
Plaintiff,
v.
PETER HOCHSTEIN,
Defendant.

Docket 99 No. 394
MEMORANDUM and ORDER

This is a most difficult case. On the one hand we have allegations of "Murder most foul". On the other, clear evidence of countless violations of the law, and countless tramplings of the constitutional and statutory rights of these two defendants, as well as the rights of numerous persons who have nothing to do with these particular cases, but whose words and conversations have been illegally intercepted and recorded by a vigilante private detective, licensed by the State of Nebraska, over a period of several months. The difficult question is whether certain evidence must be suppressed because of such violations.

The body of Ronald Abboud was found on November 2, 1975 in a field west of Omaha. Mr. Abboud had previously been reported missing and last seen on October 29, 1975. The autopsy disclosed that Mr. Abboud had been shot in the head, neck and back. Early in the investigation, suspicion settled on defendants Michael Anderson and Peter Hochstein.

In June of 1976, relatives of the deceased hired Dennis Whelan, a private detective, to investigate the murder of Ronald Abboud. Whelan was told that the Abboud family was interested in establishing the guilt

or innocence of Anderson and Hochstein, defendants herein. Whelan was told of two other persons that the family felt might have something to do with the matter -- Lon Reams and Mike Becker.

Between June 3 and November 11 of 1976, Whelan gathered information about these persons and one other, Charles Paige, through ordinary means of visual surveillance, interviews and record checking. Whelan testified that this method of investigation led to his conclusions that Anderson and Reams had a business and social relationship and that Hochstein, Anderson and Reams had a social relationship; Hochstein and Paige had a "strong" relationship; and Becker didn't have much of any association with the others.

As of November 11, 1976, Whelan had reached the following conclusions as to Lon Reams and Charles Paige (Transcript of Hearing, p. 119:

"I came to the conclusion that there was a difference of opinion; some felt that Reams was involved; I felt that Reams was involved; another party felt that Reams was not involved, that it was Paige, instead of Reams, that drove the car. We then felt that it was necessary to gain positive proof that these people did, in fact, commit the crime. That's when we installed the wire tap or electronic surveillance. That was phase two."

Whelan further testified (Transcript of hearing, p. 120):

"Q What information did you have at that time that you felt was reliable?

MR. LATHROP: At what time?

MR. COOPER: As of November 11, 1976, the day before the first installation.

A The information and the things that I was aware of by that time was the association between the individuals, their capability, their opportunity, and those things that went into making up a mode of operation for a crime of this

nature. I also put together the thing in a time frame which fit into what was going on. I also had the various locations of the individuals involved. Their activities indicated that they were into other illegal activities, for instance, burglary and those types of things; and that they would be of the nature of being able to commit such a crime. I had a lot of information about the checks, the forgeries --

THE COURT: (Interposing) Did you have anything other than what the police had?

THE WITNESS: I am not really sure, Your Honor, if I did or not. I don't believe so."

It is obvious then that as of November 11, 1976, Whelan had no evidence against anyone and felt "it was necessary to gain positive proof that these people did, in fact, commit the crime." (Emphasis supplied.)

It is also clear that as of that date Whelan knew only what the proper investigating authorities knew. The facts in the case are punctuated as of that date -- before that date, perfectly legal activities, and after, primarily totally illegal activities.

Beginning November 12, 1976, Whelan began his illegal investigation. On November 12, Whelan broke and entered into Charles Paige's apartment and installed a room bug. Whelan reentered the apartment to change the power supply on December 1, and the bug went out of operation on December 9, 1976. Whelan testified that he got no useful information from this bug.

On November 15, 1976, Whelan testified he entered defendant Hochstein's apartment and installed a room bug and put a transmitter

on Hochstein's telephone. The receiver for this transmitter was located in another apartment leased by Whelan. On December 10-12, 1976, Whelan testified he installed a telephone crossover line in the telephone company junction box, and rigged an extension from the Hochstein telephone to Whelan's rented apartment, where recordings were made of telephone conversations from and to the Hochstein apartment until April 21, 1977. These intercepted conversations between December 12, 1976 and April 21, 1977 were constantly monitored and were retained on nine voice-activated 3600 ft., 2 track reels and submitted in evidence.

The bugs in the Hochstein apartment were in use from November 15 to November 22, 1976. According to the testimony of Whelan, the room bug transmissions were not recorded and were not of any value.

On November 25, 1976, Whelan removed the front-door lock at Anderson's home and made a master key. On November 29, 1976, Whelan entered the Anderson home and installed two room bugs -- one in the bedroom and one in the living room -- and one telephone transmitter bug. Whelan re-entered the Anderson home on admittedly 6 occasions to "repair the equipment and install additional power supplies." Whelan testified the bedroom bug "never was operational" and the living room bug went out of operation on November 30; and that the telephone transmitter bug was operational only until December 23, 1976. The receiving equipment for the telephone bug transmitter was said to be in a van parked in the street. Whelan testified that some conversations were recorded, but that the transmission was so poor that he couldn't get much from it. Whelan testified that these telephone conversations were recorded on cassettes that were destroyed.

At a subsequent point in the hearing, Whelan produced a cassette type (Ex. 45) of a conversation between Mrs. Anderson and another party. This cassette, by some strange quirk, seems to be the only cassette

saved, and it is of high quality, clear and distinct with every word of that conversation readily audible. No other recordings of the Anderson wire tap are available to the Court.

On April 15, 1977, Whelan met with Sam Cooper, a deputy county attorney, and played some tapes for him. At a later date, Whelan also gave Mr. Cooper a transcript of excerpts from various telephone conversations covering the period from December 29, 1976 to April 18, 1977. Between April 15 and June 15, 1977, Whelan and Mr. Cooper talked at least 13 times. On June 7 or 8, 1977, Mr. Cooper and the Douglas County Attorney interviewed Lon Reams at the office of the County Attorney. No admissions were made by Reams at this time.

After this conversation, at the suggestion of Mr. Cooper, Whelan talked to Lon Reams for the first time in the evening of June 13, 1977. At this conversation, Reams testified that "he [Whelan] said that he had taped conversations that showed my implication in it, ***". Later in his testimony, Reams stated that Whelan did not use the phrases "taped conversations", but that Whelan had said that he had tapes or conversations showing Reams' "involvement in this murder."

After this Whelan-Reams conversation on June 13, 1977, Reams went to an attorney and gave a statement to the County Attorney on June 15, 1977.

Applying the law as the Court sees it to this factual situation, we find the following:

1. On November 11, 1976, Whelan knows nothing that the proper authorities do not know.

2. On November 12, 1976, Whelan begins a course of totally illegal electronic surveillance of the two defendants herein, as well as others;

3. On April 15, 1977, Whelan reports to the County Attorney that he has wiretapped Anderson and Hochstein and thinks they are guilty along with Lou Reams.

4. On June 7 or 8, 1977, the Douglas County Attorney interviews Reams and obtains no admissions or statements.

5. On June 13, 1977, at the specific request of the County Attorney, Whelan interviews Reams. He tells Reams that Whelan knows he (Reams) is implicated in the Abboud murder because of tapes or conversations and suggests that he (Reams) should see a lawyer and confess.

6. On June 15, 1977, Reams gives a statement to the County Attorney, implicating the present defendants.

Legally, this all leads to an inescapable conclusion. Aside from the obvious Fourth Amendment considerations, the situation is fully covered by Nebraska statute. Sec. 86-712 provides:

"No part of the contents of any intercepted wire or oral communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of Chapter 86, article 7." (Emphasis supplied)

Determination must be made, then, as to what evidence is "derived" from Whelan's illegal operations. Again the way seems clear.

First of all, it is admitted by all that illegal wiretaps, violating Sec. 86-707, are deeply involved in this case. Since Section 86-707 has been violated, Section 86-712 (set out above) comes into play. Defendants are "aggrieved persons" as defined in Section 86-701 (8).

Defendants' evidence presented at the hearing on defendants Motion to Suppress shows a possible nexus between the illegal tapes and the State's case. Examination of the evidence shows the name of the witness Reams disclosed in the transcript of intercepted conversations given by Whelan to the deputy Douglas County Attorney.

Under all the cases read by the Court, the burden of going forward shifts to the State and the State must prove, by a preponderance of the evidence, (not beyond a reasonable doubt) that the allegedly tainted

evidence has an independent source, see Nardone v. United States, 308 U.S. 338; United States v. Giordano, 416 U.S. 505; United States v. Schipani, 289 F. Supp. 43.

The State has not proved that various portions of evidence has an independent source. The State admits the testimony concerning an incident in Cedar Rapids, Iowa, wherein defendant Hochstein allegedly used the name "Jim Parker" springs entirely from intercepted telephone conversations and admits such evidence is inadmissible. The State also, in Brief, concedes it may not use any of the Whelan wiretaps and states it does not intend to use a court-autorized wiretap, and the Court finds that the State could not use such evidence because the court-ordered wiretap is dependent, in part, on evidence illegally obtained by Whelan.

The same ruling must apply to evidence seized under the search warrant, because the warrant also was based on an affidavit containing illegally obtained evidence.

The most difficult area arises in connection with the testimony of Lon Reams. Initially, the Court felt that the actual giving of the statement constituted such a voluntary human expression that the "taint" of the illegality would be removed. Examination of the cases shows to the contrary. As most clearly stated in United States v. Tane, 329 F. 2d 848:

> "The government next contends that Pase's testimony was not subject to suppression because it was the product of an intervening voluntary act, breaking the necessary nexus between the tap and the testimony. While the proffer of a living witness should not be "mechanically equated with the proffer of inanimate evidentiary objects illegally seized," Smith v. United States, 324 F.2d 879, 881 (D.C.Cir. 1963); McLindon v. United States, 117 U.S. App. D.C. -, 329 F.2d 238 (1964), the government has failed to carry its burden

of showing that the information gained from the wiretap did not lead, directly or indicrectly, to the discovery of Pase and to Pase's willingness to testify. See United States v. Coplon, 185 F.2d 629, 636, 28 A.L.R.2d 1041 (2 Cir. 1950). Indeed, the record demonstrates that the identity of Pase and knowledge of his implication in unlawful payments was derived from the wiretap, and that Pase was unwilling to testify or even admit to making any unlawful payments until he was told by the Assistant District Attorney that the December 6 conversation between his attorney and union officials had been tapped. The road from the tap to the testimony may be long, but it is straight."

See also Brown v. Illinois, 422 U.S. 590; and Wong Sun v. United States, 371 U.S. 471.

The State has adduced no independent evidence showing that the LON REAMS testimony was reached by actions independent of the illegal wiretaps. The State does not have to prove that the Reams testimony was not obtained by use of the illegal wiretaps, but the State must prove that the Lon Reams testimony was reached by some means independent of the illegal wiretaps.

No such showing has been made to this Court. Examination by the Court of each page of the hundreds of pages of police reports made before April 15, 1977 (the date Whelan conferred with deputy County Attorney Cooper) showed only three mentions of Lon Reams:

1) On November 10, 1975, Reams was interviewed by Sgt. J. P. Wintle, as follows:

> "Reporting officer interviewed party REAMS, Lon A. w/M dob 07-27-51 4870 S. 157 St. 895-1185 self-employed Corporate Insurance Consultant works out of his residence. Interview with Lon REAMS concerned a possible threat made by the party ANDERSON, Michael against party ABBOUD. REAMS stated he has known Mike ANDERSON since approximately February 75 during that time he recalled no specific threats or especially bad blood between the parties ANDERSON or ABBOUD. REAMS stated that only on one occasion has he heard party ANDERSON curse ABBOUD in the past but nothing specific.
> It should be noted that the party REAMS and the party ANDERSON are close friends as well as business associates.

2) On May 20, 1976, Sgt. Wintle made the following report:
"Information received from Investigator Stuart Halpin, NSP indicated he gained it from a confidental informant as follows. HALPIN stated the part Peter HOCHSTEIN, who is employed at the Radio Shack, 30 & Dodge Street, purportedly carries a gun under his belt and has stated he knows how to use it and has used it. HALPIN further stated HOCHSTEIN was about to lose his job at the Radio Shack, however he wasn't sure about the date of that. HALPIN further went on stating Lon REAMS who is a friend or busine ; partner of C. Michael ANDERSON has a private plane which he parks at Eppley Airfield. HALPIN apparently has some information indicating the party that did the killing in the ABBOUD homicide had come from the Minneapolis area.
No further information."

3) On June 29, 1976, Sgt. Dempsey made the following report:
"On 29jun76 at approximately 1000 hours this officer in the company of NSP Officer Steve KYLES went to Independant Plaza located in the Old Mill Shopping Center in an attempt to contact C. Michael ANDERSON. Officers talked with his partner, Lonnie REAMS and REAMS advised ANDERSON was enroute to the office and would be there shortly. Officers set up a surveillance across the street, waited until approximately 2315 hours when ANDERSON arrived."

Aside from these references, no mention of Reams' name has been found by this Court. It might be noted that as of June 13, 1977, Whelan, in his report to the Abboud family (Exhibit No. 43) wrote, "Talked with Cooper, aware of Lon's whereabouts. Cooper still thinks Lon was not involved but know what happened. We decided that Mila and I should talk with Lon and make a deal."

The Reams testimony can only come from an exploitation of the illegal wiretaps.

Practically all of the cases in this area of the law refer to the problem of the "fruit of the poisonous tree." In this case, considering the pervading illegality injected into the case by Whelan, the disputed evidence might well be considered "the fruit of the poisonous forest." Such evidence must be suppressed.

IT IS THEREFORE ORDERED:

1. That the following evidence is suppressed and may not be used in the trial of this matter:
   a) The testimony of Charles Paige;
   b) All testimony concerning the Cedar Rapids incident;
   c) The Court-authorized wiretap;
   d) Evidence seized pursuant to the search warrant issued June 15 and 18, 1977;
   e) The testimony of Lon Reams.

2. The case is set for trial on February 6, 1978 in order to afford the State of Nebraska its right to direct appeal of this ruling to the Nebraska Supreme Court pursuant to the provision of Section 86-705 (12).

Dated this 23rd day of December, 1977.

BY THE COURT:

John S Grant

Judge

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1204